July 3, 2003

Mr. Robert L. Zimmerman
Sanders County Attorney
1111 Main Street
P.O. Box 519
Thompson Falls, MT 59873-0519

Dear Mr. Zimmerman:

At the request of your local justice of the peace, you have sought the Attorney General's Opinion concerning the following question: "Does the phrase "deferred term of imprisonment" in Subsection (6) of Mont. Code Ann. § 45-9-102(6) and in § 45-10-103 entitle an individual convicted of a first offense of that section to a deferment of any jail sentence?" Because of the nature of your inquiry and the fact that it can be answered by reference to applicable statutes and court decisions, it has been determined that a letter of advice, rather than a formal opinion, is appropriate in response to your question.

Mont. Code Ann. §§ 45-9-102 (2002) and 45-10-103 (2002), Criminal Possession of Dangerous Drugs and Drug Paraphernalia, both provide that a person convicted of a first violation of either section is presumed to be entitled to a deferred imposition of sentence of imprisonment. These two statutes have specific language guiding sentencing procedures related to convictions based on the violations contained in Mont. Code Ann. §§ 45-9-102 and 45-10-103. Also considered is Mont. Code Ann § 46-18-201 (2002), the general sentencing statute.

Legislative history does not answer this specific question. Testimony regarding the 1983 amendment to §§ 45-9-102 and 45-10-103 does indicate the purpose of the amendments was to a) enforce prosecution of misdemeanor drug offenses and b) because these are lesser offenses, to place jurisdiction in justice court. The general purpose of the statutory revisions is recorded in the House Judiciary minutes as being, "to allow a defendant a fair and speedy trial for a first offense." House Committee on Judiciary hearing, January 14, 1983. Jurisdiction was moved from District Court to Justice Court because first offense misdemeanor drug charges were not regularly being

enforced in District Court and were often dropped. Justice Court was felt to be a more appropriate venue to deal effectively with the issue and to provide a speedier trial and more effective sentencing. The Legislature adding the term, "of imprisonment" to these statutes has the effect of eliminating the option for judges to impose jail time for first offenses, in those cases in which the presumption applies.

You question how the three statutes (Mont. Code Ann. §§ 45-9-102 (2002), 45-10-102 (2002) and 46-18-201 (2002)) guide sentencing judges in deferring imposition of a sentence of imprisonment. The specific language in Mont. Code Ann §§ 45-9-102 (2002) and 46-10-103 (2002), controls over the more general sentencing statute, Mont. Code Ann § 46-18-201 (2002). When a conflict exists between multiple statutes, the rules of statutory construction require that the interpreter "look first to the plain meaning of the words it contains" and give those words "their usual and ordinary meaning." Duck Inn, Inc. v. Montana State university-Northern, 285 Mont. 519, 523, 949 P.2d 1179, 1181 (1997). Further "A more specific statute will control over a more general statute." Dolan v. School District No. 10, 195 Mont. 340, 346, 636 P.2d 825, 828 (1981).

The effect of considering the three statutes together in sentencing first-time offenders, under Mont. Code Ann. §§ 45-91-02(6) and 45-10-103(6), is to restrict the option of, "imposing . . .incarceration in a detention center not exceeding 180 days" provided to the sentencing judge under § 46-18-201(4)(b), MCA. Using statutory construction rules, the specific reference to, "imprisonment" found in §§ 45-9-102(6) and 45-10-103, MCA, effectively overrides the general sentencing statute language allowing incarceration in a detention center not exceeding 180 days in those cases in which the presumption applies. Mont. Code Ann § 46-18-201(4)(b). Therefore, the specific language entitling the individual to a presumption of a deferred sentence of imprisonment in §§ 45-9-102 and 45-10-103 Mont. Code Ann supersedes any conflicting restriction in the general penalty statute Mont. Code Ann. § 46-18-201(4)(b).

Note that the judge is only restricted from sentencing incarceration when the presumption of deferred imposition of sentence of imprisonment applies. The judge retains considerable discretion in sentencing if the presumption of deferment is overcome. Regardless, the remaining restrictions and conditions provided under Mont. Code Ann. § 46-18-201(4), which relate generally to conditions of probation, may be imposed without conflict to the presumption of entitlement of deferred imposition of sentence of imprisonment found in §§ 45-9-102 and 45-10-103, MCA. These restrictions or conditions may include, but are not limited, to: limited release during employment hours; conditions for probation; payment of the costs of

confinement, fines, costs; placement in a community corrections program, etc. as found in §46-18-201(4), MCA.

Further, although an individual is presumed to be entitled to a deferred imposition of sentence of imprisonment based on §§ 45-9-102 and 46-10-103, Mont. Code Ann., the presumption entitling deferment may be overcome. The Montana Rules of Evidence define "presumption" as follows:

> A presumption is an assumption of fact the law requires to be made from another fact or groups of facts . . .
>
> (1) Conclusive presumptions are presumptions that are specifically declared conclusive by statute . . .
>
> (2) All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption . . .

Mont. R. Evid. 301(b)(1) and (2).

Applying the definition of presumption noted above to the statutes at issue, the presumption of entitlement to a deferred imposition of sentence is a disputable presumption. Specifically, this presumption may be overcome by other evidence as delineated in State v. Bolt, 204 Mont. 261, 264, 664 P.2d 322, 324 (1983). However, "unless so contradicted the presumption [of entitled deferment of imposition of sentence] controls." Id., quoting State v. Simtob, 154 Mont. 286, 291, 462 P.2d 873, 876 (1969).

The Montana Supreme Court enumerated four standards that must be met to overcome the statutory presumption in favor of deferred imposition of sentence:

> First, we interpret it to mean the record itself must disclose the evidence, as we held in Simtob. Second, the evidence may be contained either within or without the proof of the crime itself. Third, the aggravating circumstances should be some substantial evidence over and above the simple facts of a prima facie case. Finally, it is clear that this Court will require hearings and a record to disclose the aggravating evidence, if there be no express voluntary waiver as in this case.

Bolt, 204 Mont. 261, 265, 664 P.2d 322, 234 (1983), quoting Campus v. State, 157 Mont. 321, 327, 483 P.2d 275, 279 (1971).

The rebuttable presumption of entitlement to a deferred imposition of sentence is overcome when all four of the above-mentioned criteria are met. If overcome, the presumption no longer entitles an individual to a deferred imposition of sentence of imprisonment under Mont. Code Ann. §§ 45-9-102 and 45-20-204.

To summarize, individuals convicted of a first offense under Mont. Code Ann. §§ 45-9-102 and 45-10-103 are presumed to be entitled to a deferred imposition of a sentence of imprisonment, overriding the detaining provision found in Mont. Code Ann. § 46-18-201(4)(b). The sentencing judge may apply the other restrictions and conditions provided in the general sentencing statute. However, the presumption of entitlement to a deferred sentence granted in Mont. Code Ann. §§ 45-9-102 and 45-10-103 may ultimately be overcome. This letter of advice may not be cited as an official Opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN
Chief Civil Counsel

cdt/jym